UNITED STATES
v.
JEAN M. McMULLIN
DAVID S. McMULLIN

IBLA 86-351 Decided May 24, 1988

Appeal from a decision of Administrative Law Judge Robert W. Mesch declaring a placer mining claim invalid. CA-9652.

Affirmed.

1. Administrative Procedure: Administrative Law Judges -- Administrative Procedure: Decisions -- Mining Claims: Contests

A decision by an Administrative Law Judge who did not preside over a hearing in a mining claim contest will not be overturned for that reason where an evaluation of the credibility of witnesses was not a material factor in reaching the decision.

2. Mining Claims: Contests -- Mining Claims: Surface Uses

When the Government charges in a contest complaint that a mining claim is not being held in good faith for mining purposes and at the hearing the record establishes that the claimants have occupied a cabin on the claim for many years; that the claimants' mining activities are no more than recreational; and that such occupancy is not reasonably incident to the mining activities undertaken, the Administrative Law Judge may properly conclude that the claim is not being held in good faith for mining purposes.

APPEARANCES: David S. McMullin, pro se and for Jean M. McMullin; Judy V. Davidoff, Esq., Office of the General Counsel, U.S. Department of Agriculture, San Francisco, California, for the Government.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

David S. McMullin and Jean M. McMullin have appealed from a decision of Administrative Law Judge Robert W. Mesch, dated December 6, 1985, declaring the James Creek Bar placer mining claim invalid because of lack of discovery

of a valuable mineral deposit and appellants' failure to hold the claim in good faith for mining purposes. The claim embraces approximately 20 acres of land situated in sec. 30, T. 32 N., R. 12 W., Mount Diablo Meridian, Trinity County, California, within the Shasta-Trinity National Forest, along the James and Hayfork Creeks.

This case was initiated on July 22, 1981, with the filing of a contest complaint by the Bureau of Land Management (BLM), on behalf of the Forest Service, U.S. Department of Agriculture, charging in part that: "There are not presently disclosed within the boundaries of the mining claim minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery. * * * * The claim is not held in good faith for mining purposes." Appellants filed a timely answer and the case was assigned to Administrative Law Judge E. Kendall Clarke, who conducted a hearing on October 18, 1984, in Redding, California, and on November 7 and 8, 1984, in Sacramento, California. 1/

At the November 8 hearing, counsel for appellants made a motion that he be allowed to take the deposition of Carl Haynes. In support of the motion, he stated that Haynes and three other parties had sampled areas of appellants' mining claim and that he desired to have Haynes testify regarding that sampling, but that Haynes was unable to testify due to the illness of his wife (Tr. III 80-81). Judge Clarke granted appellants' motion over the Government's objection, stating that counsel for appellants and the Government should set a date for the deposition on or before December 15, 1984. Id. at 84-85, 87. Judge Clarke afforded the Government 30 days from receipt of the deposition transcript to submit an expert analysis of the testimony and documentary evidence received at the deposition. Id. at 87-88.

On November 28, 1984, counsel for appellants deposed John R. Leslie, explaining that, following the November 8 hearing, counsel had determined that Leslie had prepared certain documents regarding the sampling and that it was, thus, more appropriate to depose Leslie than Haynes (Deposition of John R. Leslie, at 2-4). Counsel for the Government, who attended the deposition, objected to the substitution of Leslie for Haynes, without advance notice to either her or Judge Clarke. Id. at 2. The deposition proceeded and Leslie was examined by counsel for appellants and by counsel for the Government.

On December 31, 1984, the Government filed an analysis of Leslie's deposition with Judge Clarke. That analysis, dated December 20, 1984, was prepared by Richard Harty, a geologist with the Forest Service. Appellants filed on January 28, 1985, a motion to strike Harty's analysis because it was not under oath or, alternatively, to require that it be accompanied by a sworn affidavit or declaration under penalty of perjury. In either case, appellants requested Judge Clarke to strike Harty's hearsay statements regarding the opinion of other experts.

1/ Because each hearing transcript is separately paginated, we will refer to the transcripts of the Oct. 18, Nov. 7, and Nov. 8, 1984, hearings, as Tr. I, Tr. II, and Tr. III, respectively.

On January 30, 1985, Judge Clarke issued an order stating that he would disregard Leslie's deposition and Harty's analysis in reaching a decision, since he had granted no authority to take that deposition. 2/ Subsequent to that order, Judge Clarke became unavailable due to the closing of the Sacramento office of the Office of Hearings and Appeals, and the case was transferred to Judge Mesch for decision.

In his December 1985 decision, Judge Mesch concluded:

> In view of the evidence presented by the mining claimants, no useful purpose would be served by considering and summarizing the evidence presented by the Forest Service in support of the charges in the contest complaint, and evaluating that evidence against numerous allegations made by counsel for the mining claimants that it is unreliable and lacks probative value. The mining claimants' evidence clearly establishes that the claim is invalid because it has not been perfected and is not supported by the discovery of a valuable mineral deposit as required by the mining laws. It also dictates the conclusion that the claim is invalid because it was not located and is not being held for mining purposes, but as a site for a mountain cabin in violation of the mining laws. [3/]

(Decision at 5-6).

2/ There is no evidence that Leslie was unable to attend the hearing. The request to take Haynes' deposition was granted because Haynes was not available on the date he was to testify.

3/ It is well established that the evidence submitted by a mining claimant may independently show the invalidity of the claim. United States v. Pool, 78 IBLA 215, 220 (1984), and cases cited therein. Judge Mesch's statement is not a reflection on the quality of the case presented by the Government. The Government established a prima facie case of the lack of discovery of a valuable mineral deposit on the claim through the testimony of Emmett Ball and Richard Harty, Forest Service mineral examiners. Ball and Harty inspected the claim, providing notice to appellants, and took samples. They sampled areas pointed out by David McMullin (Tr. I 118-19; Tr. II 60), an area of old workings on the claim (Tr. I 130-34), and the gravel exposed in a road cut (Tr. I 122-23; Tr. II 105-07), and performed dredge sampling in Hayfork Creek (Tr. II 76-88). Based on assays of their samples, they provided their expert opinions that a prudent man would not be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine (Tr. I 143-49; Tr. II 5, 7-9, 56, 93-95, 119-22). Moreover, since David McMullin was called as an adverse witness by the Government (Tr. I 75), his testimony may be considered as part of the Government's prima facie case. See United States v. Zweifel, 11 IBLA 53, 89-90, 80 I.D. 323, 339-40 (1973), aff'd, 508 F.2d 1150 (10th Cir.), cert. denied, 423 U.S. 829 (1975). His testimony served to bolster the expert testimony of Ball and Harty regarding the lack of a discovery of a valuable mineral deposit.

[1] In their statement of reasons for appeal (SOR), appellants contend first that Judge Mesch should not have rendered a decision in this case because he did not preside at the hearing and, thus, was not in a position to assess the credibility of the witnesses. In his decision, at page 2, Judge Mesch noted that the case was transferred to him for decision pursuant to 5 U.S.C. § 554(d) (1982), i.e., the section of the Administrative Procedure Act which governs administrative adjudications. That statutory section provides that the official who presides at the reception of evidence shall make the initial decision "unless he becomes unavailable to the agency." 5 U.S.C. § 554(d) (1982).

As the court observed in Gamble-Skogmo, Inc. v. Federal Trade Commission, 211 F.2d 106 (8th Cir. 1954), given the importance of an assessment of the credibility of witnesses in the resolution of some cases, an agency is not permitted to simply substitute for a presiding official in every case of unavailability but, rather, only "where credibility evaluation as such can be said to not be necessary or capable of constituting a material factor in the reaching of [an] * * * initial decision." Id. at 114. We agree that an Administrative Law Judge who conducts a hearing is in the best position to assess the credibility of witnesses, and, thus, should in most cases render the initial decision whenever possible. Virgil Lopez, 21 IBLA 33, 46 n.8 (1975), and cases cited therein. Nevertheless, upon de novo review of the record in this case, we conclude that a proper resolution of the issues does not depend on the credibility of the witnesses. Even accepting the testimony offered on behalf of appellants as true, we conclude, as did Judge Mesch, that appellants have not demonstrated that their mining claim is supported by the discovery of a valuable mineral deposit or that the claim is being held in good faith for mining purposes. Therefore, in these circumstances, we conclude that the result in this case has not been prejudiced in any way by the transfer of the case to Judge Mesch for decision, and the transfer provides no basis for overturning his decision. See Consolidated Carriers Corp. v. United States, 321 F. Supp. 1098, 1100 (S.D.N.Y. 1970), aff'd, 402 U.S. 901 (1971); United States v. Jones, 67 IBLA 225, 230 (1982).

Appellants contend that the deposition of John R. Leslie was improperly excluded from consideration, and that it presented "relevant and compelling [evidence] on the * * * value of the discovery of the mineral deposit" (SOR at 1). The record indicates that Judge Mesch, in adjudicating the case, did not consider that deposition, which had previously been excluded by Judge Clarke. The basis for Judge Clarke's exclusion of the Leslie deposition was that he had not granted leave to take the deposition of anyone other than Haynes. In fact, Judge Clarke specifically stated in granting the request to take the deposition that "Mr. Ha[y]nes will be the witness" (Tr. II at 87).

The question presented is whether Judge Clarke properly excluded the Leslie deposition from consideration. We find that he did. At no time between November 8, 1984, when Judge Clarke authorized the taking of Haynes' deposition, and November 28, 1984, when Leslie's deposition was taken, did counsel for appellants inform Judge Clarke or counsel for the Government

that he wished to substitute Leslie for Haynes. In objecting to the substitution of witnesses, counsel for the Government pointed out that she had spoken to counsel for appellants on November 27, 1984, and he had made no mention of a substitution of witnesses (Leslie Deposition at 5).

In requesting the opportunity to take Haynes' deposition, counsel for appellants explained:

> He [Haynes] came in yesterday morning, sat through the entire hearing, and he wanted to testify in regard to sampling he and three other gentlemen did. * * * Mr. Ha[y]nes indicated that he did have a problem with his wife, who is very ill, and he had to go back last night. So we couldn't have him here today. And I would like to have a date agreeable to both sides set so that we could take his deposition.

(Tr. II at 80-81).

According to counsel for appellants, the samples referred to were not available on November 8, 1984 (Tr. II at 81); nevertheless, counsel indicated that, had Haynes been able to testify on that day, he would have. At the deposition, counsel provided no explanation for Haynes' absence, other than to indicate his belief that Leslie, who was involved in the sampling, would be better able to explain the exhibits introduced at the deposition (Leslie Deposition at 4).

It is clear that Judge Clarke had authority to permit appellants to supplement the record following the conclusion of the hearing by submitting evidence in support of their assertion of the existence of a discovery on their claim. See United States v. Victor Material Co., 67 IBLA 274, 276-77 (1982); United States v. Beckley, 66 IBLA 357, 365 (1982). However, he expressly limited his authorization to the taking of the deposition of Carl Haynes. Under the circumstances, and because, in accordance with 5 U.S.C. § 556 (1982), an Administrative Law Judge has broad discretion in regulating the course of a proceeding, we believe Judge Clarke acted properly in excluding the Leslie deposition and the response thereto from the evidence in this case.

Even if we were to conclude that Judge Clarke erred in excluding the Leslie deposition, consideration of that evidence would not alter the result in this case, since our review of that deposition and the response thereto reveals that Leslie provided no testimony which would support a conclusion that a discovery of a valuable mineral deposit exists on the James Creek Bar claim. 4/

4/ Harty prepared the Dec. 20, 1984, response to the Leslie deposition. We agree with Harty's assessment of the deposition, when he stated at pages 5-6 of his response:

"In summary, Mr. Leslie's deposition covers, to a great extent, information relating to hardrock samples taken outside of the claim

Appellants point to BLM guidelines for the initiation of certain contest actions (SOR at 1). They quote the portion of the guidelines which state that BLM must "only initiate a contest with the recognition that a prudent operator may reside on a mining claim * * * while conducting operations under the mining laws." Id. at 2. That quote is taken from BLM Instruction Memorandum No. 85-670, dated September 18, 1985. The memorandum generally concerns whether occupancy of an unpatented mining claim can be considered reasonably incident to mining operations and, thus, permitted under 30 U.S.C. § 612(a) (1982). The "contest" to which the quote refers is a contest asserting a violation of the statutory and regulatory restrictions on the occupancy of unpatented mining claims. Id. at 2 (referring to contests alleging a violation of 43 CFR 3712.1(a) and (b)). The memorandum does not preclude the initiation of a mining claim contest as a method to establish the validity of a claim, where the charges are lack of discovery and bad faith, or have any bearing on cases already initiated. 5/

[2] Even assuming that appellants' reference to the guidelines is an attempt to refute Judge Mesch's conclusion that appellants had not held their claim in good faith for mining purposes, it fails to do so. The purpose of the mining law is to further the speedy and orderly development of the mineral resources of the United States. Where a person locates a mining claim or continues to occupy a mining claim for any purpose other than the mining of valuable mineral deposits, that occupancy frustrates the purpose of the mining law and the claim may be declared invalid. In such case the

---

fn. 4 (continued)
boundaries. These samples were unrelated to the evaluation of a placer deposit and the assay method utilized by Mr. Leslie [electromotive series, aqua regia process] has been repudiated by experts in the field of chemical analysis.

"In discussion with government minerals examiners, in response to the government's interrogatory and in testimony given at the hearing, Mr. David McMullin made no mention of any placer mineral potential in James Creek. In the field examination the government mineral examiners found no evidence of past or present mining along James Creek nor did they recognize it to have any significant mineral potential.

"In sampling James Creek for placer gold Mr. Haynes and Mr. Leslie demonstrated that by using the most feasible mining method available, they could recover gold values in the ranges of $ .80-$ 1.00 for four man-hours of labor. A gross return value of $ .20-$ .25 per hour.

"These recovery values are somewhat lower but do not appear inconsistent with the values the government mineral examiners found in Hayfork Creek on the James Creek Bar PMC. They seem to confirm that mineral has not been found within the boundaries of the James Creek Bar PMC in sufficient quantity and quality to justify a prudent man in further expenditure of his time and means with a reasonable prospect of success in developing a paying mine."

5/ Considering the duration of the occupancy and the extent of the mining operation conducted by appellants, the memorandum provides absolutely no support for appellants' case.

claim is not being held in good faith for mining purposes. United States v. Zimmer, 81 IBLA 41 (1984); see United States v. Nogueria, 403 F.2d 816, 823-24 (9th Cir. 1968). However, where the Government makes a charge of bad faith, the Government bears the ultimate burden of proof on that issue. In re Pacific Coast Molybdenum Co., 75 IBLA 16, 35, 90 I.D. 352, 363 (1983).

In this case, the question of good faith arose because of the apparent lack of mining activity and the extended occupancy of the cabin on the mining claim. Occupancy on a mining claim is lawful only if it is reasonably incident to mining activities. Bruce W. Crawford, 86 IBLA 350, 373-75, 92 I.D. 208, 220-22 (1985); see United States v. Langley, 587 F. Supp. 1258, 1263 (E.D. Cal. 1984). In Langley, the court stated at page 1262:

> To permit uses on national forest land under the rubric of "mining" which are not in fact incident to mining or its attendant operations would conflict with the policies underlying both the forest preservation laws and the mining laws since such uses entail potential depredation of forest land without yielding the concomitant benefits to society envisaged by Congress in its passage of the mining laws.

Our conclusion regarding lack of good faith is the same as that of Judge Mesch and we agree with his statement on pages 8-9 of his decision:

> 7. It is difficult to believe that the contested claim was located by the McMullin family in 1939 and that it has been occupied since that time by the McMullin family for the purpose of mining and extracting minerals, and not for other purposes, in view of the following:
>
> (i) a cabin was constructed, apparently prior to the location of the claim, and maintained for a period approximating 50 years that bears no reasonable relationship to any prospecting or exploration activity that might have been conducted on the claim or to the limited mining operation that the claim might support if a valuable mineral deposit can be found within the claim;
>
> (ii) after a period approximating 50 years, there is no evidence on the ground of any workings of a mining nature of any significance other than two relatively small tailings piles that resulted from some prospecting or mining activity almost 50 years ago; and the tailings piles were not even within the limits of the claim until the most recent amended location notice was recorded in 1983;
>
> (iii) after occupying land under the mining laws for a period approximating 50 years, there is no evidence of any mineralization having been extracted from

the claim other than an estimated 10 ounces of gold during the five year period from 1979 to the time of the hearing in 1984; and of that estimated amount, an unknown quantity was recovered by an unknown number of individuals, other than the mining claimants, who presumably were engaging in weekend or recreational activity -- it is open to question whether the amount of gold actually recovered by the mining claimants during the five year period preceding the hearing was sufficient to pay the estimated costs during the same period of time of maintenance work on the cabin, i.e., $ 1,000.00, and/or the estimated costs of cleaning up brush and fallen trees, i.e, $ 750.00, (Ex. Nos. 18A - 18F);

(iv) during the year preceding the hearing, Mr. McMullin made $ 20.00 a day for five days for a "net" profit of $ 100.00 for the year -- this would pay the cost of the required annual assessment work on the claim and leave nothing to pay the annual $ 75.00 county property tax on the cabin, (Tr. 160 - Nov. 7);

(v) the mining claimants, and their predecessors, have occupied, and claimed exclusive possession of, a scenic area of a National Forest for a period approximating 50 years, and during that period of time, sufficient work has not been done, and presumably sufficient interest did not exist, to even ascertain whether the land might contain mineralization of sufficient quality and quantity to warrant a mining operation -- after almost 50 years, it is still hoped that "a regular examination or exploration program" will result in "the defining of an adequate ore reserve to support a limited mining operation", (Ex. No. 32);

(vi) under the circumstances, it is beyond belief that for the past approximately 50 years the McMullin family has occupied, and claimed exclusive possession of, the land covered by the contested mining claim for the purpose of mining and extracting valuable mineral deposits or for the purpose of searching for a mineral deposit of sufficient value to warrant the use of the land for mining purposes -- a bona fide mining claimant certainly does not require approximately 50 years to ascertain whether the land he has claimed under the mining laws is, in fact, valuable for mining purposes.

It is clear that appellants' activities on the claim have been no more than recreational. There is no evidence to support a conclusion that during the 50 years of occupancy the McMullin family expended even a nominal amount

of time and means in an effort to develop a valuable mine. The vast majority of the effort expended was clearly directed to the development and maintenance of the property for recreational purposes. David McMullin resided on the claim at least part of each year from 1979 to the time of the hearing (Tr. I 78). He testified that his occupancy was not necessary to carry out mining activities (Tr. I 80-81).

We conclude that appellants' occupancy of the cabin was not reasonably incident to mining activities on the James Creek Bar placer claim. Any mining activity undertaken during appellants' occupancy was incidental to the recreational use and occupancy of the cabin. Even if we were only to examine the testimony of David McMullin and the evidence and other testimony presented by appellants, we would conclude that the James Creek Bar placer mining claim was not being held in good faith for mining purposes. The Government sustained its ultimate burden of proof on this issue.

Finally, appellants contend that "[e]vidence offered by the Forest Service as to mineral values, etc., was improperly excluded" (SOR at 2). Appellants do not identify specifically what evidence was excluded. The only evidence offered by the Forest Service, on behalf of the Government, that was excluded by Judge Clarke was Harty's analysis of Leslie's deposition. We have reviewed that evidence and find that it did nothing to strengthen appellants' case. Accordingly, appellants' argument provides no basis for overturning Judge Mesch's December 1985 decision.

We conclude that appellants' placer mining claim is invalid for lack of discovery of a valuable mineral deposit and further that the claim was not being held in good faith for mining purposes.

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

R. W. Mullen
Administrative Judge